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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 17

WALTER HUMPHREY, Etc., Et Al., - Petitioners,

versus

C. W. MOORE, Etc., Et Al.,
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89,
and
DEALERS TRANSPORT COMPANY, - Respondents.

AND

No. 18

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, - Petitioner,

versus

C. W. MOORE, Et Al., - - - - Respondents.

BRIEF FOR RESPONDENTS, C. W. MOORE, ET AL.

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BRIEF FOR RESPONDENTS, C. W. MOORE, ET AL.

SECTION I.

These respondents accept the statement of opinions below and jurisdiction.

SECTION II.

These respondents accept the statement of statute involved, except as follows:

Section 8(d) is not complete as quoted in petitioners' brief and its import cannot be ascertained from the extracted portion. This portion must be considered:

> ". . . where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract. . . ."

SECTION III.

QUESTIONS PRESENTED.

(1) Whether an individual or group of employees has the right to maintain an action in state court to enforce their rights under an existing collective bargaining agreement?

(2) Whether the decision of the Joint Conference Committee, providing that employees of another company should be "sandwiched in" on the seniority board with respondent employees, the effect of which was to deny respondents their jobs, was a decision that could be enjoined by state court action for the reasons: (1) It was not an issue under the collective bargaining agreement which was to be arbitrated, and (2) even if it was a decision to be arbitrated under that agreement, the decision was not reached after fair representation of the respondents by their bargaining unit, and was arbitrary, capricious, unfair and thereby in violation of respondents' contractual rights.

SECTION IV.

STATEMENT.

These respondents accept the statement as presented by the petitioners, but with the additions and corrections as hereinafter indicated.

(a) The multi employer unit and its agreement. These respondents ask the court to also consider Article I, Section (c), "When the employer needs additional men he shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union."

Article IV, Section 1, ". . . . terminal seniority shall prevail at all times except as provided for in Article IV, Section 6, Subsection (b)2."

Article IV, Section 6, Subsection (b)2 provides that when a branch terminal divisional operation is closed or partially closed, the employees at that partially closed branch terminal shall have "the right to transfer to the branch terminal divisional operation into which the work was transferred, if regular work is there available. Such employee, however, shall go to the bottom of the seniority board and shall have a right of job selection only in accordance with the seniority at such terminal."

Article VII, Section 2(a), "Disputes shall first be taken up between the Employer and the Local Union involved. If the parties are unable to settle the dispute, the same shall then go to the Local Joint Committee."

(b) Application of the agreement of E & L to the absorption of E & L routes by Dealers. This statement itself states there was an absorption of E & L by Dealers, whereas it is the belief and contention of these respondents that there was no absorption of the business of E & L by Dealers. The sole basis of such a statement is a reliance on the statement of Mack Snites, wherein he stated a certain portion of the business of E & L was absorbed by Dealers (R. 44, also referred to on page 8 of Petitioners' Brief). It is the contention of these respondents that that statement is taken out of context and that an accurate statement of what was actually done in this regard is found at R. 42. The facts are that Dealers and E & L could not both continue to operate at Louisville and by agreement reached between the companies, the plan to consolidate the respective operations geographically, Dealers took over certain secondary runs formerly held by E & L. Dealers did not take over any equipment or any business of E & L. There was a payment of from $3500.00 to $4500.00 for all of the business taken over by Dealers from E & L. As stated by Mr. Snites this purchase price was only a nominal price based generally upon the cost of obtaining transfer of the secondary authority at the Louisville terminal.

Mr. Snites, stated (R. 42):

> "The purchase price is naturally a nominal price which is placed on operating authority and it usually represents that amount of money which it takes to obtain the authority. In this case it was either $3500.00 or $4500.00."

(c) Proceedings below. These respondents have no particular disagreement with the statements as found in this section of petitioners' brief, except that it is our opinion that a better understanding of the Court of Appeals decision will be reached by reading that opinion, rather than the quotes out of context as stated on page 10 and 11 of the petitioners' brief.

SECTION V.

ARGUMENT.

(a) Whether an Individual or Group of Employees Has the Right to Maintain an Action in State Court to Enforce Their Rights Under an Existing Collective Bargaining Agreement?

This is a suit originating in the state courts of the state of Kentucky filed by C. W. Moore on his own behalf and on behalf of other members of the class against his local union and against Dealers Transport Company, his employer. The respondents, C. W. Moore, *et al.*, were all employees of Dealers Transport Company at the time this action was filed on November 18, 1961. They were all members of Local Union No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and this action was brought for an injunction to prevent the Union from denying to them their rights under a collective bargaining agreement known as the Automobile Carrier Truckaway Agreement, effective March 1, 1961 through February 29, 1964. While Dealers Transport Company was made a party to the action, there was and is no dispute between these re-

spondents and their employer, Dealers Transport Company, and Dealers has taken the position that it is a nominal party to this suit, rather than a real party in controversy.

This, therefore, is a suit by individual members of a Union against the Union for rights under an existing collective bargaining agreement. This court has admittedly had difficulty in drawing the line between state and federal court jurisdiction particularly since passage of the Taft-Hartley Act. The line, however, is drawn to permit state courts jurisdiction in a case such as this one for enforcement of a right under an existing contract by an employee against his labor union. Any ruling to the contrary would deprive individual citizens of their right to prosecute in local courts a claim under a contract. In view of the massive size, power and proportions now achieved by some labor unions and by some employers, this right is vital. This philosophy is stated by Justice Black in his separate opinion in the case of Smith v. Evening News Association, 9 Law Ed. 2d 246, 83 S. Ct. ——, 371 U. S. 195, decided December 10, 1962, wherein he stated:

> "Finally, since the court is deciding that this type of action can be brought to vindicate workers' rights, I think it should also decide clearly and unequivocally whether an employee injured by the discrimination of either his employer or union can file and prosecute his own law suit in his own way. I cannot believe that Congress intended by the National Labor Relations Act either as originally passed or as amended by Section 301 to take away

rights to sue which individuals have freely exercised in this country at least since the concept of due process of law became recognized as a guiding principle in our jurisprudence. And surely the Labor Act was not intended to relegate workers with law suits to the status of wards either of companies or unions."

If the ruling of the Joint Conference Committee had been allowed to stand—and except for the action of the Court of Appeals of Kentucky it would have been allowed to stand—two-thirds of the employees of Dealers Transport would have lost their jobs with no recourse for the wrong done them, not by their employer, but by their union. The Dealers' employees were satisfied with their employer and the employer was satisfied with its employees. It is a reasonable assumption that it was the very efficiency of Dealers' employees that caused Ford to select that company for its business, which resulted in E & L abandoning the Louisville area. Unless these employees have access to court procedure, we have here a wrong without a remedy and, as Mr. Justice Black said in his dissenting opinion, we have workers "relegated to the status of wards of the companies and unions."

The basic issue here involved is whether a decision completely inequitable can be allowed to stand because the individual wronged has no court in which he can seek relief. The rights of individuals who are members of a labor union should not be lightly disregarded. It should further be recognized that there are instances where the interest of the union and the union leader-

ship runs counter to the rights of individual workers. Such is the situation in this case. The bargaining unit for the employees of Dealers Transport supposedly was Local 89, but we find Local 89 representing not the employees of Dealers but the employees of another company, E & L, against the interest of the employees of Dealers. Respondents have no conflict with their employer. Their conflict is with their own union, which, by its arbitrary decision, has deprived them of their jobs. They had no bargaining unit representing them at Detroit before the Joint Conference Committee. Their bargaining unit was representing no employees of their employer, and their bargaining agent was seeking to take away their jobs.

In addition to the injustice with which they were confronted, they were in the anomalous situation of being forced to pay dues and assessments to employ the multitude of counsel now used against them both in the courts of Kentucky and before this court. By what stretch of the imagination can one reach the conclusion that these respondents had any representation or any bargaining unit in their behalf before the Joint Conference Committee?

In Smith v. Evening News, *supra*, 9 L. Ed. 2d at 249, this court held that an employee does have the right to sue for breach of contract. The court stated:

> "In Lucas Flour as well as in Atkinson the Court expressly refused to apply the pre-emption doctrine of the Garmon case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly,

is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301."

The court then concluded that the petitioner's action "arises under Section 301 and is not pre-empted under the Garmon rule."

Even the petitioners seem to concede that that case is analagous to the present case insofar as jurisdiction of the state court to decide an issue involving breach of contract. In their petition for Writ of Certiorari to the Court of Appeals of the State of Kentucky, at page 15, the petitioners stated:

> ". . . it must be concluded that the subject matter is within the exclusive competence of the Board and that the state courts are without jurisdiction. The court has already consented to review an analogous issue in Smith v. Evening News, certiorari granted 7 L. Ed. 2d 793 (1962) (No. 89, 1961 Term). The Evening News case, like the present one, involves a question of whether the state court has jurisdiction over a suit for damages for breach of a collective bargaining agreement where the action complained of also constituted an unfair labor practice in violation of the National Labor Relations Act."

Even before the Smith v. Evening News case, *supra,* the state courts had jurisdiction over this issue, under

authority of the case of International Association of Machinists v. Marcos Gonzales, 356 U. S. 617, 620, 2 L. Ed. 1018, 78 S. Ct. 923, where it was held that federal legislation had not pre-empted the field where breach of contract between the employee and the union was the issue before the state court. This court stated:

> "In either case, the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of litigation in the present case, as the parties and the court conceived it, was a breach of contract governing the relations between the respondent and his unions."

In Textile Workers Union v. Lincoln Mills of Alabama, 353 U. S. 448, at 453, 1 L. Ed. 2d 972, 77 S. Ct. 912, this court stated:

> "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of law and not the National Labor Relations Board."

See also Teamsters Local v. Lucas Flour Co., 369 U. S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571; Dowd Box Co. v. Courtney, 368 U. S. 502, 7 L. Ed. 2d 483, 82 S. Ct. 519, and General Drivers Union v. Riss and Co., Inc., —— U. S. ——, 9 L. Ed. 2d 918, 83 S. Ct. 790.

The respondents in this case were therefore entitled to have their rights under a collective bargain-

ing agreement determined by the forum of their choice. They were rightfully entitled to select the courts of the State of Kentucky.

(b) Whether the Decision of the Joint Conference Committee, Providing That Employees of Another Company Should Be "Sandwiched in" on the Seniority Board With Respondent Employees, the Effect of Which Was to Deny Respondents Their Jobs, Was a Decision That Could Be Enjoined by State Court Action for the Reasons: (1) It Was Not an Issue Under the Collective Bargaining Agreement Which Was to be Arbitrated, and (2) Even If It Was a Decision to be Arbitrated Under That Agreement, the Decision Was Not Reached After Fair Representation of the Respondents by Their Bargaining Unit and Was Arbitrary, Capricious, Unfair Thereby in Violation of Respondents' Contractual Rights.

First of all, let it be stated that these respondents recognize and agree that the state court in determining the rights of the respondents under this contract are bound by federal substantive law. Teamsters Union v. Lucas Flour Company, 369 U. S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571, stated:

> "We hold that in a case such as this, incompatible doctrines of local law, must give way to principles of federal labor law."

This same rule is stated in other decisions of this Honorable Court. We point it out to narrow the issues involved since we believe that under either federal substantive law, labor law, state law, or any law of equity and justice, the decision of the Court of Appeals

of Kentucky must stand. These respondents are entitled to an injunction to prevent the enforcement of the arbitrary ruling made by the Joint Conference Committee.

The Court of Appeals of Kentucky found that the question of whether Dealers was required to accept or absorb the affected employees was not an issue to be arbitrated under the collective bargaining agreement. It held:

> "Since Article IV, Section 5 had no application under the circumstances of this case, we are of the opinion that the question was not arguable under the grievance procedure. Arbitrability is an issue of law, which may be determined judicially."

We agree.

The case of United Steel Workers v. Warrior and Gulf Navigation Company, 363 U. S. 574, at 582, 583, 4 L. Ed. 2d 1409, 80 S. Ct. 1347, holds that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit by reason of the contract. We are of the opinion, as was the Kentucky Court of Appeals, that the issue of whether the employees of E & L Transport Company were to be sandwiched in on the seniority board with the employees of Dealers Transport Company was not a matter under the contract which was to be referred to arbitration. This being the case, there was no issue for the Joint Conference Committee to decide. Its decision is not, therefore, binding upon these respondents.

The full quote from the United Steel Workers v. Warrior case, *supra* (563 U. S. 582), touching on this point, is as follows:

> "The Congress, however, has by Section 301 of the Labor Management Relations Act, assigned the court the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with Congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under Section 301 must be strictly confined to the question of whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage."

Under this test the Court of Appeals of Kentucky is correct in holding this issue is not one to have been submitted to the Joint Conference Committee. There are three reasons: (1) the petitioners, Lewis and Baker, had no standing to file the original grievance since they were not employees of Dealers and were not parties to the contract made between Dealers and Local 89, which was the bargaining unit for the employees of Dealers Transport Company. (2) Article

IV, Section 5, of the contract deals only with seniority and not with initial employment and therefore until the "absorbing" company takes the employees there is no seniority problem created and therefore no question to be arbitrated. (3) The facts show there was no absorption of business by Dealers of another private contract or common carrier and therefore Article IV, Section 5, has no application.

Article VII, Section 2a, described as Grievance Procedure, provides:

> "Disputes shall first be taken up between the *employer* and the *local union* involved. If the parties are unable to settle the dispute, the same shall then go to the local joint committee." (Italics supplied.)

Since the contract itself provides that disputes shall be taken up between the employer and the local union involved, how could this dispute be taken up between the employer and the local union, when, in fact, the petitioners who filed this grievance were not employees of Dealers Transport Company? This grievance could not be taken up with Dealers Transport Company under the terms of the contract, likewise, there was no way for the parties to settle the dispute since they were not parties to the same contract. This, of course, involves the question of who are parties to a contract which has been described as a Multi Employer Unit? The opinion of the Court of Appeals of Kentucky raises the supposition that E & L men are represented by a different union and asked the question: "Would

they have any rights under this contract between Dealers and another collective bargaining agent?" The Court of Appeals answers: "Surely not."

This grievance could not be arbitrated when the parties who filed the grievance were not parties to the contract between Dealers and Local No. 89 and by the terms of the contract, there is no provision for the bringing of a grievance by a party who is not an employee of the employer concerned.

The Joint Conference Committee based its ruling upon the provisions of Article IV, Section 5, of the Automobile Carrier Truckaway Agreement. That section provides:

> "In the event that the employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby, shall be determined by mutual agreement between the employer and the unions involved. Any controversy with respect to such matter shall be submitted to the Joint Grievance Procedure."

This provision of the contract can give the petitioners herein no rights under this contract, since they are not a party to it, as they have never become employees of Dealers. This argument is well expressed in the decision of the Court of Appeals where it is stated:

> "It (Article IV, Section 5) deals only with seniority, and not with initial employment. Unless and until the absorbing company agrees to take the employees of the company whose business is

being absorbed, no seniority problem is created, hence this provision of the contract can have no application. It does not require that the absorbing company take these employees, but only that if it does take them, the question of seniority between the old and new employees will be worked out by agreement, or else be submitted to the grievance procedure.

". . . (They) are strangers to the dealers contract, and it was not made for their benefit."

The petitioners in their brief before this Honorable Court attempt to make this a rule of state law of the State of Kentucky, but such is not the case. Rather it is a question of interpretation of this particular contract and in it there is no provision requiring the absorbing company (if there were an absorbing company in this case) to employ the employees of the company absorbed. There being no such provision in the contract there is, therefore, no issue to be submitted to the grievance board or to the Joint Conference Committee.

For our third reason under this argument, we submit there was no absorption of the business of E & L by Dealers. E & L was abandoning its secondary runs from Louisville, Kentucky as it became necessary to consolidate its business on a geographic basis. Dealers was taking the same steps to consolidate its business geographically and both companies were doing so by reason of the competition of "piggy back" hauling of automobiles by Ford Manufacturing Company. There is no contention here that the withdrawal by E & L

was in any way contingent upon acceptance of those secondary runs by Dealers. Further, it is apparent the only way Dealers can acquire these runs is through administrative ruling of the Interstate Commerce Commerce Commission. Dealers could accomplish this by making a new application on its own or by application to take over the secondary runs of E & L. It chose to take over the secondary runs of E & L and applied for permission to do so. There was no transfer of any assets between Dealers and E & L and the only cash involved was that sum sufficient to pay the cost of the transfer of the secondary runs before the I.C.C. Can such a change in the course of business brought about by conditions outside the authority of either employers or the employees, be considered either an absorption of the business of E & L or a merger of the companies? Can such a change in business status, without the transfer of any assets, be considered a merger or absorption so as to give employees of another company any rights under a contract of employment between an employer and its employees? We think not and by reason of this it is apparent that the decision of the Joint Conference Committee, based upon Article IV, Section 5, of the Bargaining Contract, is a decision made on an issue not before it because it is not one to be arbitrated under this contract.

It is next the contention of these respondents that even if there was an issue which could be arbitrated as a grievance before the Joint Conference Committee,

which we, as above argued, contend is not the case, that this particular decision of the Joint Conference Committee cannot stand. The very essence of this case is the validity of a binding written Collective Bargaining Agreement. We recognize and heartily approve of the decisions of this Honorable Court wherein collective bargaining is encouraged and a settlement of labor issues are resolved by arbitration rather than by legal action. There is no issue here made by respondents which is "incompatible with the concept of collective bargaining as a 'continuous process' " referred to by petitioners on page 11 of their brief. Nor is this an effort to "jettison selected disadvantages of collective action while preserving selected advantages" as contended on page 19 of their brief. Again we state the question is, what rights does an individual acquire by reason of a written contract, where that contract happens to be a collective bargaining agreement?

This court has recognized and upheld the right of an individual to sue under a collective bargaining agreement. This court has also recognized that there is a limit to the authority of an arbitrator and has further placed a burden upon the collective bargaining unit who is the chosen representative of employees to bargain honestly and fairly on behalf of its members. This is vitally necessary for the reason expressed in the case of Conley v. Gibson, 355 U. S. 41, 46, 2 L. Ed. 2d 80, 78 S. Ct. 99, wherein this court stated:

> "A contract may be fair and impartial on its face, yet administered in such a way with the

active or tacit consent of the Union, as to be flagrantly discriminatory against some members of the bargaining unit."

The case of Ford Motor Company v. Huffman, 345 U. S. 330, at 336, expresses the obligation of the bargaining agent as follows:

> "The National Labor Relations Act as passed in 1935, as amended in 1947, exemplifies the faith of Congress in free collective bargaining between *employers* and their *employees* when conducted by freely and fairly chosen representatives of *appropriate units of employees.* That the authority of bargaining representatives, however, is not absolute is recognized in Steele v. L & N Railroad Company, 323 U. S. 192, 198, 199, 89 L. Ed. 173, 65 Supreme Court 226, in connection with the comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an *appropriate unit,* requires them to make an honest effort to serve the interest of all those members without *hostility to any.*" (Italics supplied.)

Professor Cox in his article "Rights Under a Labor Agreement," 69 H. L. R. 601 at page 638, states:

> "The relationship between law and industrial relations will be improved, and collective-bargaining will work better, in my opinion, without any sacrifice of the interest of individual employees, if contracts which contemplate active administration through a grievance and arbitration procedure controlled by the union are held to vest the power

to settle grievances in the collective-bargaining representative, *subject to its fiduciary duty of fair representation.*" (Italics supplied.)

In Clark v. Hein-Werner Corporation, 99 N. W. 2d 132, 8 Wis. 2d 264 (Wis. 1960), cert. denied 362 U. S. 962, the court recognized this conflict, saying:

> "In most situations whether the union is performing its fiduciary duty of fair representation in an arbitration proceeding presents a question of fact. However, where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has been no fair representation of the other group . . . the old adage that one cannot serve two masters is particularly applicable to such a situation."

What bargaining unit was representing these respondents? Is it not true that the basic unit of labor organizations is the unit comprised of employees of a particular employer, who bind themselves together by selection of one representative to seek for them certain beneficial rights in connection with that employment? These respondents chose Local 89 and that Local, as their bargaining unit and representative, secured for them a written contract, which was of benefit to these employees. That same bargaining unit happens to be the bargaining unit of a group of employees who are the petitioners in this case, who have a similar contract with their own employer. It is readily apparent that the conflict between employees of

E & L and the employees of Dealers is irreconcilable and one of those two rival groups of employees must suffer because of circumstances over which neither they nor their employer had control. What is the bargaining unit in such a case? Can it possibly be said that Local 89 under the circumstances of this case represented these respondents in the hearing before the Joint Conference Committee? Even the petitioners admit that these respondents were told up until the time a few minutes before the decision was rendered by the Joint Conference Committee that the decision would be in their favor, but it changed its mind and the decision went against these respondents. Does such action meet the test as stated in the Huffman case, above, that the fairly chosen representatives of appropriate units of employees, must serve the interest of those members without *hostility* to any? The answer is that their bargaining unit did not represent them and that such a decision reached in that manner cannot stand.

Impartiality of an arbitrator is recognized as a basic requirement:

> "As an arbitrator acts in a quasi-judicial capacity, it is generally held that he must possess the judicial qualifications of fairness, disinterestedness, and impartiality. Consequently, the existence of any facts which may operate to affect the impartiality of arbitrators, provided such facts are unknown to the party adversely affected, will render such arbitrators incompetent to make a valid award.

"The fact that an arbitrator has previously formed and expressed his opinion on the matter submitted may be grounds for setting aside the award . . ."

6 C. J. S., Arbitration and Award, Section 46b, page 186.

In the case of Drivers Union v. Riss & Co., *supra*, ——U. S. ——, 9 L. Ed. 2d 918, 920, 83 S. Ct. 790, the validity of a Joint Area Cartage Committee award was in issue. This court did not decide the validity of that award since it was unnecessary to the decision but the court did recognize the right to question the validity of such an award by a suit for breach of contract:

"Of course, if it should be decided after trial that the grievance award involved here is not final and binding under the collective bargaining agreement, no action under Section 301 to enforce it will lie. Then, should petitioners seek to pursue the action as a Section 301 suit for breach of contract, there may have to be considered questions unresolved by our prior decisions."

The present case may reach those issues. In this regard it is our position that these respondents were not fairly represented, that the Union mislead them by assurances of a favorable decision until a few moments prior to the actual hearing, that the union had an interest in the outcome of the hearing and used its influences to achieve that end so as to violate its duty not to act with hostility to a member or group of members.

We recognize and do not wish to undermine the desirability of settlement of differences by the means chosen by the parties in the collective bargaining agreement. This does not mean, however, that a decision destroying rights of individuals under a written contract can be upheld when made at a time the real parties in interest were not represented and the joint board had an interest in the outcome. A joint board must be as impartial as an arbitrator and the parties in interest must be represented on such a board if it is to be given the power of an arbitrator and if its decisions are given the weight of an arbitration proceeding. Otherwise, the union is failing in its duty of fair representation without hostility to any member of its union.

Any arbitrator, however, is limited in its authority. This limit is expressed in the case of United States Steel Workers of America v. Enterprise Wheeler & Carr Corporation, 363 U. S. 593, 597, 4 L. Ed. 2d 1424, 80 S. Ct. 1358, wherein this court discussed the powers and authority of an arbitrator:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

> When the arbitrators words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.'

The decision reached by the Joint Conference Committee completely disregards the rights of the employees of Dealers, respondents herein, to the collective bargaining agreement. The contract of Dealers, while similar to the contract that E & L had with its employer, is a separate collective bargaining contract and these employees of Dealers cannot be deprived of their jobs when there was no absorption of another business and there is no argument with their own employer. Even if we assume that this is not a separate contract, the decision of the Joint Conference Committee completely disregards the contract as provided in Article IV governing the seniority rights of employees. E & L terminated its operation at Louisville. If employees of E & L had any rights under the Truckaway Agreement, it is stated in Subsection (b)2: which provides that when a branch terminal divisional operation is closed or partially closed, the employees at the partially closed branch terminal shall have "the right to transfer to the branch terminal divisional operation into which the work was transferred, if regular work is there available. Such employee, however, shall go to the bottom of the seniority board and shall have the right of job selection only in accordance with seniority at such terminal." When read in conjunction with Section 1 of Article IV it is apparent this Truckaway Agreement contract preserves the rights of an em-

ployee to continue working at the terminal which is his regular and fixed place of employment and if employees of some closed branch transfer, they go to the bottom of the seniority board. Dealers' employees, the respondents herein, are the parties who are continuing to work at the regular place of employment and E & L employees, the petitioners herein, are the ones who transfer. Certainly, the decision of the Joint Conference Committee is directly in conflict with the contract.

The decision of an arbitrator, if the Joint Conference Committee can be considered an arbitrator in this instance, reached in disregard to the specific contractual rights of certain parties to that contract, cannot stand. It is particularly true that such a decision cannot stand where employees for whom the contract was made were not fairly and honestly represented.

SECTION VI.

CONCLUSION.

The judgment of the Court of Appeals of Kentucky should be affirmed.

Respectfully submitted,

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